

Not Reported in F.Supp.2d, 2000 WL 255989 (W.D.Pa.), 2000 Copr.L.Dec. P 28,030, 53 U.S.P.Q.2d 1831
(Cite as: **2000 WL 255989 (W.D.Pa.)**)

H

United States District Court,
W.D. Pennsylvania.
TWENTIETH CENTURY FOX FILM
CORPORATION, et al., Plaintiffs,
v.
ICRAVETV, et al., Defendants.
NATIONAL FOOTBALL LEAGUE, et al.,
Plaintiffs,
v.
TVRADIONOW CORPORATION, d/b/a
iCraveTV.com, d/b/a Tvradionow.com, et al.,
Defendants.

No. Civ.A. 00-121, Civ.A. 00-120.

Feb. 8, 2000.

Gregory B. Jordan, Frederick H. Colen, Maria N. Rullo, Christopher J. Soller, Reed, Smith, Shaw & McClay, Frederick N. Egler, Jr., Egler, Garrett & Egler, Charles B. Gibbons, Arthur J. Rooney, II, Klett, Lieber, Rooney & Schorling, Pittsburgh, PA, Bruce P. Keller, Michael R. Potenza, Debevoise & Plimpton, New York, NY, William D. Iverson, Neil K. Roman, Ronald G. Dove, Jr., Covington & Burling, Washington, DC, for Plaintiffs.

Robert M. Linn, Christine Wettach, Cohen & Grigsby, Paul W. Roman, Dickie, McCamey & Chilcote, Pittsburgh, PA, Andrew Z. Schwartz, Marc K. Temin, Richard W. Benka, Foley, Hoag & Eliot, Boston, MA, for Defendants.

ORDER OF COURT

ZIEGLER, J.

*1 AND NOW, to wit, this 8th day of February, 2000, having previously considered and granted on January 28, 2000 Plaintiffs' Motion for Temporary Restraining Order and having now further considered the evidence and heard the parties on Plaintiffs' Motion for Preliminary Injunction, it is ORDERED that Plaintiff's Motion is GRANTED. It is, therefore, ADJUDGED and DECREED that:

1. Defendants, their officers, agents, servants and employees and those persons in active concert or participation with them, are preliminarily enjoined from:

a. infringing by any means, directly or indirectly, any of plaintiffs' exclusive rights under Section 106(1)-(5) of the Copyright Act, including but not limited to through the transmission (whether through "streaming" or otherwise) of plaintiffs' copyrighted programming into the United States via the iCraveTV.com site or any other Internet site or any online facility of any kind; and

b. infringing any of plaintiffs' trademarks or trade names, or otherwise making any false designation of origin or false representation with regard to sponsorship or authorization of iCraveTV by the plaintiffs.

2. If, after the date of this Preliminary Injunction, defendants again engage in any Internet or other online transmission of plaintiffs' copyrighted programming, they shall:

a. file and serve within five (5) days of first again engaging in such activity, and on the fifteenth day of each month thereafter, a compliance report setting forth a detailed update about the manner in which defendants are complying with this Preliminary Injunction; and

b. provide plaintiffs, on request, on a weekly basis with copies of all of their server logs in a readily usable format specified by plaintiffs.

3. The Findings of Fact and Conclusions of Law made by the Court in issuance of this Preliminary Injunction are being entered separately by the Court contemporaneously with entry of the Preliminary Injunction.

4. The bond of \$25,000 posted by plaintiffs on Monday, January 31, 2000, after the Temporary Restraining Hearing shall continue.

5. The Order shall be effective as of 11:45 A.M.

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E.S.T. on Tuesday, February 8, 2000.

*FINDINGS OF FACT AND CONCLUSIONS OF
LAW WITH RESPECT TO ISSUANCE OF
PRELIMINARY INJUNCTION*

1. This is a civil action for money damages and equitable relief, filed by the National Football League (“NFL”), National Basketball Association (“NBA”), and NBA Properties, Inc. (“NBA Properties”) (collectively “the Sports Leagues”), Twentieth Century Fox Film Corporation, Disney Enterprises, Inc., Columbia Tristar Television, Inc., Columbia Pictures Television, Inc., Columbia Pictures Industries, Inc., Metro-Goldwyn-Mayer Studios Inc., Orion Pictures Corporation, Paramount Pictures Corporation, Universal City Studios, Inc., Time Warner Entertainment Company, L.P. (collectively “the Studios”), and ABC, Inc., CBS Broadcasting Inc., and Fox Broadcasting Company (collectively “the Networks”). Plaintiffs seek a preliminary injunction, contending that defendants violated the Copyright Act, 17 U.S.C. Section 106, the Lanham Act, 15 U.S.C. Section 1125(a), and various state laws.

*2 *1834 2. Defendants William R. Craig, George Simons and William R. Craig Consulting are residents of the Commonwealth of Pennsylvania. *Deposition of George Simons (“Simons Dep.”)*, *Hearing Ex. 90*, p. 7; *Deposition of William R. Craig (“Craig Dep.”)*, pp. 104-05. William Craig is a dual citizen of the United States and Canada. *Craig Dep.*, p. 107. Defendant iCraveTV is a private Canadian company, and Defendant TVRadioNow Corp. is a Canadian company incorporated under the laws of Nova Scotia, with its principal place of business in Ontario, Canada. *See Hearing Ex. 89 (iCraveTV website)*.

3. The gravamen of this dispute concerns the public performance of plaintiffs' copyrighted programming from Toronto, Canada, to computer users in the United States since November 30, 1999, over the Internet. *See Plaintiffs' Verified Complaint at Dk. No. 00-121, Paragraphs 33-34; Plaintiffs' Complaint at Dk. No. 00-120, Paragraphs 1, 33, 37*. Specifically, defendants have streamed copyrighted professional football and basketball games as well as copyrighted programs such as “60 Minutes,” “Ally McBeal,” and “Star Trek Voyager,” framed with advertisements

obtained by defendants. *See Plaintiffs' Verified Complaint at Dk. No. 00-121, Paragraphs 2, 5; Plaintiffs' Complaint at Dk. No. 00-120, Paragraphs 43, 44*. Plaintiffs allege that defendants have captured United States programming from television stations in Buffalo, New York and elsewhere, converted these television signals into computerized data and streamed them over the Internet from a website called iCraveTV.com. *See Plaintiffs' Verified Complaint at Dk. No. 00-121, Paragraphs 5, 33; Plaintiffs' Complaint at Dk. No. 00-120, Paragraphs 37, 38; Hearing Exs. 6, 8*. According to plaintiffs, any Internet user may access iCraveTV.com by simply entering three digits of any Canadian area code, one of which is provided to the user on the site itself, and by clicking two other buttons. *Testimony of Michael Shamos (“Shamos Test.”)*, pp. 29-31. Further, Internet users from the United States and elsewhere easily may revisit the site because iCraveTV causes a small file, or cookie, to be deposited in a user's computer during his or her initial visit so that the user can automatically bypass defendants' screening process. *Shamos Test.*, pp. 33-37. Although defendants have ceased streaming of plaintiffs' copyrighted programming since entry of the temporary restraining order on January 28, 2000, there is no dispute that defendants streamed plaintiffs' programming continuously from November 29, 1999 through January 28, 2000, despite several requests from plaintiffs that defendants cease doing so.

4. Jurisdiction is premised on 28 U.S.C. Sections 1331, 1338 and 1367, and venue is appropriate in this District under 28 U.S.C. Sections 1391 and 1400(a).

5. As a threshold question, the Court must first determine whether it has subject matter jurisdiction. Pursuant to 28 U.S.C. Section 1338, Congress has provided that the district courts shall have original jurisdiction of every civil action arising under any Act of Congress relating to copyrights and trademarks. *See* 15 U.S.C. Section 1121. Although the trademark laws of the United States have enjoyed extraterritorial application, the Court is mindful of the long-standing precept that the United States copyright laws do not have extraterritorial operation. *See Allarcom Pay Television, Ltd. v. General Instrument Corp.*, 69 F.3d 381 [36 USPQ2d 1654] (9th Cir.1995).

*3 6. Defendants argue that their website is for

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Canadian viewers only and it is not intended for citizens of the United States and elsewhere. Thus, the argument continues, the alleged improper acts are limited to Canada.

[1] 7. Plaintiffs have presented testimony, sworn affidavits and declarations establishing that Pennsylvania residents have accessed defendants' website and viewed the programs which were streamed thereon. *See Declaration of Gabriele Preusse; Shamos Test., pp. 28-37; Declaration of Maureen Atkinson, Exhibit B; Declaration of Christopher F. Richardson; Declaration of Ben Edelman, Ex. 2.* Further, defendants posted an article on the website by a United States citizen noting that access to defendants' website could be obtained by any United States citizen with little or no difficulty. *See Hearing Ex. 20; Craig Dep., pp. 28, 30* ("when I read it, it blatantly was counseling I thought people to, to disrespect our request which was not to-was to represent accurately who-when people come on to our site where they're located"; article "mock [ed] security" of website).

8. Accordingly, when an allegedly infringing act occurring without the United States is publicly performed within the United States, the Copyright Act is implicated and a district court possesses jurisdiction. *See Los Angeles News Service v. Conus Communications Company*, 969 F.Supp. 579 (C.D.Cal.1997); *cf. Metzke v. The May Department Stores Co.*, 878 F.Supp. 756, 761 [34 USPQ2d 1844] (W.D.Pa.1995). Subject matter jurisdiction exists because, although the streaming of the plaintiffs' programming originated in Canada, acts of infringement were committed within the United States when United States citizens received and *1835 viewed defendants' streaming of the copyrighted materials. These constitute, at a minimum, public performances in the United States. *See Hearing Exs. 20, 24, 35, 64; Declaration of Maureen Atkinson, Ex. B; Declaration of Ben Edelman; Shamos Test., pp. 28-37, 46-49; Deposition of Cox Interactive ("Cox Dep.") Hearing Ex. 91, pp. 35-38, 75-79; Declaration of David Egan; Declaration of Edward M. Katz.*

9. The Court also possesses personal jurisdiction over each of the defendants. With respect to George Simons and William R. Craig, this Court finds that personal jurisdiction exists because Simons and Craig

are Pennsylvania residents. *See Simons Dep., Hearing Ex. 90, p. 7; Craig Dep., pp. 104-05; Carlough v. Amchem Products, Inc.*, 10 F.3d 189 (3d Cir.1993).

10. With respect to Defendants iCraveTV, TVRadioNow Corp. and William R. Craig, the Court may also determine whether personal jurisdiction can be asserted on another basis. Rule 4(e) of the Federal Rules of Civil Procedure authorizes personal jurisdiction over a nonresident to the extent permissible under the laws of the forum state. *See Fed.R.Civ.P. 4(e)*. The forum state in this case is Pennsylvania, and Pennsylvania's long-arm statute is codified at 42 Pa.C.S.A. Section 5322. The statute provides that jurisdiction is permitted to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contacts with the state. 42 Pa.C.S.A. Section 5322(b) (Purdons 1981); *Pennzoil Products Co. v. Colelli & Associates*, 149 F.3d 197, 200 (3d Cir.1998). The Court of Appeals has acknowledged that the statute permits Pennsylvania courts to exercise personal jurisdiction over non-resident defendants to the constitutional limits of the Due Process Clause of the Fourteenth Amendment. *See id.* A district court's exercise of personal jurisdiction pursuant to this long-arm statute is therefore valid as long as it is constitutional. *See id.* A district court's inquiry is solely whether the exercise of personal jurisdiction over the defendant is fair and constitutional. *See id.*

*4 11. The Court must determine whether the non-resident defendants' contacts with Pennsylvania are sufficient to support general personal jurisdiction. When a state has general personal jurisdiction over a party, that party can be haled into court in the forum state regardless of whether the subject matter of the cause of action has any connection to the forum. *Pennzoil*, 149 F.3d at 200. A non-resident's contacts with the forum must be continuous and substantial to establish general personal jurisdiction. *Provident National Bank v. California Federal Savings & Loan*, 819 F.2d 434 (3d Cir.1987).

12. The Court finds that general personal jurisdiction exists over the nonresident defendants. The Supreme Court has noted the amount and kind of activities which must be carried on by the foreign corporation in the forum state so as to make it reasonable and just to subject the company to the jurisdiction of that

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forum. See *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 414-16, 104 S.Ct. 1868, 1872-73, 80 L.Ed.2d 404 (1984). A review of the evidence leads the Court to conclude that defendants have engaged in continuous and systematic contacts with Pennsylvania. For example, the evidence of record supplied by plaintiffs established that defendants, through their agent, have on an ongoing basis, transacted business in Pennsylvania. Specifically, defendants have attempted to sell advertising out of an office maintained in the Pittsburgh area as well as others. *Simons Dep., Hearing Ex. 90*, pp. 11-16, 33-34; *Declaration of David Egan*. Further, defendants maintain an office and have a sales agent, at least a former sales agent, located within this district, namely, George Simons. *Simons Dep., Hearing Ex. 90*, pp. 11-16; *Cox Dep., Hearing Ex. 91*, pp. 22-25, 27-31, 50-53; *Hearing Ex. 1; Craig Dep.*, pp. 60-62. Defendants have also registered the iCraveTV.com domain name in the United States and have provided that the technical contact as well as the billing contact are within Pennsylvania. *Craig Dep.*, pp. 103-07; *Shamos Test.*, pp. 45-46. By maintaining an office and an agent in this state on an ongoing basis, entering into contractual relationships in this jurisdiction, and designating and maintaining billing and technical contacts within this state, the Court finds that the non-resident defendants purposely availed themselves of the privilege of conducting activities within Pennsylvania, thus invoking the benefits and protections of its laws. See *Kuntz v. Windjammer "Barefoot" Cruises, Ltd.*, 573 F.Supp. 1277, 1288 (W.D.Pa.1983) (Ziegler, J.), *aff'd*, 738 F.2d 423 (3d Cir.), *cert. denied*, 469 U.S. 858, 105 S.Ct. 188, 83 L.Ed.2d 121 (1984) (defendant who "enters this state to solicit business and initiates a series of continuous and substantial acts to derive pecuniary benefits" is subject to general jurisdiction); *Grand Entertainment Group, LTD. v. Star Media Sales, Inc.*, 988 F.2d 476, 483 (3d Cir.1993) (agent's activities count toward the minimum contacts necessary to support jurisdiction). The Court further finds that due process is not offended by the assertion of personal jurisdiction when a defendant, such as the non-resident *1836 defendants here, has maintained substantial and continuous forum affiliations. See *Bane v. Netlink, Inc.*, 925 F.2d 637, 639 (3d Cir.1991).

*5 13. Additionally, because the defendants' activities within this forum were integrally a part of the activities giving rise to the cause of action asserted,

the Court also finds that specific personal jurisdiction exists over the non-resident defendants. See *Testa v. Janssen*, 482 F.Supp. 1195, 1198-99 (W.D.Pa.1980); see also *Edy Clover Productions, Inc. v. National Broadcasting Co., Inc.*, 572 F.2d 119 [197 USPQ 337] (3d Cir.1978) (finding personal jurisdiction where defendant could have anticipated broadcast of program that allegedly violated copyright laws in the forum state); *Hershey Pasta Group v. Vitelli-Elvea Co., Inc.*, 921 F.Supp. 1344, 1349-50 (M.D.Pa.1996) (Rambo, J.) (non-resident defendant subject to personal jurisdiction in trademark infringement claim). Further, defendants also streamed plaintiffs' programming to numerous other computer users throughout the United States and made efforts to sell advertising in the United States through agents in New York and Pennsylvania who had extensive advertising activities within the United States and with whom the non-resident defendants had extensive contacts. See *Hearing Exs. 20, 24, 35, 64; Declaration of Maureen Atkinson, Ex. B; Declaration of Ben Edelman; Shamos Test.*, pp. 28-37, 46-49; *Simons Dep., Hearing Ex. 90*, pp. 11-16; *Cox Dep., Hearing Ex. 91*, pp. 22-30, 35-39, 50-55, 75-79; *Craig Dep.*, pp. 60-62; *Declaration of David Egan; Declaration of Edward Katz*.

14. To obtain a preliminary injunction, an aggrieved party must prove: (1) a reasonable probability of success on the merits; (2) irreparable injury; (3) that less harm will result to the defendant if preliminary relief is granted than to the plaintiffs if preliminary relief is denied; and (4) the public interest, if any, weighs in favor of plaintiffs. *Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir.1999); see also *J.C. Penney Co., Inc. v. Giant Eagle, Inc.*, 813 F.Supp. 360, 367 (W.D.Pa.1992), *aff'd*, 995 F.2d 217 (3d Cir.1993); *C. Southco, Inc. v. Kanebridge Corporation*, 2000 U.S. Dist. LEXIS 112, at *6 (E.D.Pa. Jan. 12, 2000). The standard for a temporary restraining order is the same as for a preliminary injunction. See *Nutrasweet Co. v. VitMar Enterprises, Inc.*, 112 F.3d 689, 692-93 (3d Cir.1997).

15. Plaintiffs need not prove their whole case to show likelihood of success on the merits. Rather, if the balance of hardship tips in favor of plaintiffs, then the defendants may only raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for litigation and thus for

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more deliberative investigation.

16. In analyzing the likelihood of success on the merits, the Court must consider what plaintiffs must prove to prevail on a copyright infringement claim. To establish a violation of the Federal Copyright Act, the plaintiff must show ownership of the copyright and copying by the defendant. *See Educational Testing Services v. Katzman*, 793 F.2d 533 [230 USPQ 156] (3d Cir.1986); *Healthcare Affiliated Services, Inc. v. Lippany*, 701 F.Supp. 1142, 1150 (W.D.Pa.1988). Copyright registration is prima facie evidence of the validity of the copyright. *See* 17 U.S.C. Section 410(c).

*6 17. To prove a trademark infringement claim under the Lanham Act, a trademark owner must prove that the mark is valid and legally protectable, the mark is owned by the plaintiff, and the defendant's use of the mark to identify goods or services is likely to create confusion concerning the origin of the goods or services. *See Express Services, Inc. v. Career Staffing Services*, 176 F.3d 183 (3d Cir.1999). If a mark is both federally registered and incontestable, the mark is presumed to meet the first two requirements.

18. The plaintiffs have established without rejoinder from the defendants that they have copyright and trademark ownership of several items, including, among others, the Super Bowl (*see Declaration of Frank Hawkins*), the NBA Finals (*see Declaration of William S. Koenig*), and the NFL playoff games and regular League games (*see Declaration of Frank Hawkins*), "The Simpsons" (*see Declaration of Daphne Gronich*), "Married With Children" (*see Declaration of Gregory K. Boone*), "Frasier" (*see Declaration of Scott Martin*), "Babe" (*see Declaration of Richard Silliman*), "Twentieth Century Fox" (*see Declaration of Daphne Gronich*), "Disney" (*see Declaration of William Rogers*), and "The Drew Carey Show" (*see Declaration of Marjorie N. Neufeld*).

19. Defendants do not deny that they have copied these items, represented themselves as the authors and that they have publicly performed them over the Internet. Rather, defendants argue that there is no desire on the part of defendants for any United States residents to access iCraveTV. Notwithstanding defendants' intentions, the Court finds that plaintiffs

have presented sufficient facts to establish their claims of copyright and trademark infringement and therefore likely success on the merits. *See also Ford Motor Co. v. Summit Motor Prods.*, 930 F.2d 277, 299 [18 USPQ2d 1417] (3d Cir.1991), *cert. denied*, 502 U.S. 939, 112 S.Ct. 373, 116 L.Ed.2d 324 (1991) (intentions of *1837 defendant irrelevant as copyright infringement is strict liability tort); *Williams Elecs., Inc. v. Attic Int'l, Inc.*, 685 F.2d 870, 878 [215 USPQ 405] (3d Cir.1982) ("injunctions may be issued without a showing of willful or deliberate infringement").

20. Indeed, on January 17, 2000, John Trickey of iCraveTV reported to Cox that roughly "45 percent of the traffic impressions on the iCraveTV website' had come from Internet users based in the United States. Trickey said that he knew this from iCraveTV's "log books." *Cox. Dep.*, pp. 37-39. A January 25, 2000 breakdown of "impressions" and "clicks" onto the iCraveTV website, generated by a private ad serving system (DART) utilized by Cox, reported 1.6 million impressions (page views) from United States visitors on the iCraveTV website. This figure was second only to the figure for Canada, which was 2.0 million. *Hearing Ex. 64*.

21. Defendants also use a "Real Video" server to stream video programming through their website. This server maintains "logs" of the Internet Protocol addresses of computers that contact defendants' server to obtain access to video programming. An analysis of the Real Video server logs shows that substantial numbers of persons in the United States received the streaming of programming, including programming in which plaintiffs own copyrights. *Declaration of Ben Edelman; Shamos Test.*, pp. 41-49.

*7 [2] 22. The evidence set forth above and other evidence in the record shows that plaintiffs are likely to succeed in showing that defendants are unlawfully publicly performing plaintiffs' copyrighted works in the United States. Defendants do so by transmitting (through use of "streaming" technology) performances of the works to the public by means of the telephone lines and computers that make up the Internet. 17 U.S.C. Section 101. This activity violates plaintiffs' rights to perform their works publicly and to authorize others to do so. 17 U.S.C. Sections 106, 501(a); *see*

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also *Infinity Broadcast Corp. v. Kirkwood*, 150 F.3d 104 [47 USPQ2d 1295] (2d Cir.1998). These infringements occur in the United States and violate the U.S. Copyright Act. See *Los Angeles News Service v. Conus Communications Co. Ltd.*, 969 F.Supp. 579 (C.D.Cal.1997). Defendants have also engaged in contributory infringement by making plaintiffs' copyrighted programming available on the Internet with the knowledge that third parties (such as streambox.com) could and would further infringe plaintiffs' copyrights by further transmitting (and publicly performing) the programming. Defendants' streaming of plaintiffs' programming through the Internet, even with supposed security controls, materially contributes to these further infringements. *Columbia Pictures Indus. v. Aveco, Inc.*, 800 F.2d 59, 62 [230 USPQ 869] (3d Cir.1986); *Columbia Pictures Indus. v. Redd Home, Inc.*, 749 F.2d 154, 160 [224 USPQ 641] (3d Cir.1984), quoting *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 [170 USPQ 182] (2d Cir.1971); see also *Metzke v. The May Department Stores Company*, 878 F.Supp. 756, 760 [34 USPQ2d 1844] (W.D.Pa.1995); *CRA Mktg., Inc. v. Brandow's Fairway Chrysler-Plymouth-Jeep-Eagle, Inc.*, 1999 U.S. Dist. LEXIS 11889, at *14 (E.D.Pa. July 27, 1999).

[3] 23. Plaintiffs are also likely to succeed in showing that defendants have violated plaintiffs' rights under Section 43(a) of the Lanham Act, 15 U.S.C. Section 1125(a), by, among other things, (1) using the plaintiffs' trademarks without permission in a manner likely to cause confusion as to sponsorship or affiliation; (2) offering a search engine with special links about the Networks' and the Studios' programs, creating (in this context) the impression of some special sponsorship; (3) falsely claiming to be the copyright owner of plaintiffs' programming; and (4) conveying the erroneous impression that plaintiffs' programming lacks closed captioning and other information. See *Eden Toys, Inc. v. Florelee Undergarment, Inc.*, 697 F.2d 27, 37 [217 USPQ 201] (2d Cir.1982) (false copyright notice violates the Lanham Act); *Jews for Jesus v. Brodsky*, 993 F.Supp. 282 [46 USPQ2d 1652] (D.N.J.1998) (issuing preliminary injunction), *aff'd mem.*, 159 F.3d 1351 (3d Cir.1998).

24. Defendants have submitted a declaration of a Canadian law professor, Michael Geist, which argues that defendants' activities are permissible under Canadian law. However, because plaintiffs seek relief under U.S. law for infringements of the U.S. Copyright Act, there is no need for this Court to address any issue of Canadian law. See, e.g., *Los Angeles News Service v. Conus Communications Company*, 969 F.Supp. 579 (C.D.Cal.1997) (transmissions originating in Canada that reach into United States are infringements under U.S. Copyright Act); see also *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 91 [47 USPQ2d 1810] (2d Cir.1998) ("The Berne Convention 'provides that the law of the country where protection is claimed defines what rights are protected...'"); *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1097 [30 USPQ2d 1746] (9th Cir.) ("The applicable law is the copyright *1838 law of the state in which the infringement occurred ...") (quoting 3 Paul E. Geller & Melville B. Nimmer, *International Copyright Law and Practice* Section 17.05, at 17-39)), *cert. denied*, 513 U.S. 1001, 115 S.Ct. 512, 130 L.Ed.2d 419 (1994).

*8 [4] 25. Considering the second prong of the test for a preliminary injunction, the Court finds that plaintiffs have presented sufficient evidence of irreparable harm. Specifically, plaintiffs have established that irreparable harm will follow without the issuance of injunctive relief because they have established a prima facie case of copyright infringement, which necessarily raises a presumption of irreparable harm. Plaintiffs have lost the control with which Congress vested them of the copyrighted materials, they have lost the ability to offer particular outlets exclusive rights in particular programs or series, and they have suffered a loss of customer good will. See, e.g., *Declarations of Gregory K. Boone, Daphne Gronich, Scott Martin, Michael B. Moore, Marjorie N. Neufeld, Richard Silliman, Frank Hawkins, William S. Koenig; Testimony of Frank Hawkins*, pp. 96-97. The Court finds that these facts are sufficient to establish irreparable harm. The Court of Appeals has concluded that grounds for irreparable injury include loss of control of reputation, loss of trade and loss of good will. See *S & R Corp. v. Jiffy Lube Int'l, Inc.*, 968 F.2d 371, 378 [23 USPQ 1201] (3d Cir.1992); *Opticians Ass'n of Am. v. Independent Opticians of Am.*, 920 F.2d 187, 195 [17 USPQ2d 1117] (3d Cir.1990).

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Moreover, in this jurisdiction, the prevailing view is that a showing of a prima facie case of copyright infringement or reasonable likelihood of success on the merits, raises a presumption of irreparable harm. *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 [219 USPQ 113] (3d Cir.1983), cert. dismissed, 464 U.S. 1033, 104 S.Ct. 690, 79 L.Ed.2d 158 (1984); see also *Marco v. Accent Publishing*, 969 F.2d 1547 [23 USPQ2d 1631] (3d Cir.1992).

[5] 26. Balanced against the irreparable harm to the plaintiffs from the loss of control of their copyrighted works is the possibility that if defendants are enjoined from infringing their business built on plaintiffs' programming, defendants' programming will suffer. The Court of Appeals has rejected giving this form of harm any weight. If that were the correct standard, then a knowing infringer would be permitted to construct its business around its infringement, a result the Court cannot condone. *Apple Computer*, 714 F.2d at 1255. Other courts have reached the same sensible conclusion. See *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 612 [6 USPQ2d 1357] (1st Cir.1988) ("It would be incongruous to hold that the more an enterprise relies on copyright infringement for survival, the more likely it will be able to defeat the copyright owner's efforts to have that activity immediately halted."); *J.C. Penney Co., Inc., v. Giant Eagle, Inc.*, 813 F.Supp. 360, 370 (W.D.Pa.1992), aff'd, 995 F.2d 217 (3d Cir.1993) (granting preliminary injunction when defendant's "wounds are self-inflicted, and will not garner much judicial sympathy"); *Wales Indus. Inc. v. Hasbro Bradley, Inc.*, 612 F.Supp. 510, 522 [226 USPQ 584] (S.D.N.Y.1985); *Triad Sys. Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1338 [36 USPQ2d 1028] (9th Cir.1995), cert. denied, 516 U.S. 1145, 116 S.Ct. 1015, 134 L.Ed.2d 96 (1996).

*9 27. It is well settled in this Circuit that "[s]ince Congress has elected to grant certain exclusive rights to the owner of a copyright in a protected work, it is virtually axiomatic that the public interest can only be served by upholding copyright protections and, correspondingly, preventing the misappropriation of the skills, creative energies and resources which are invested in the protected work." *Apple Computer*, 714 F.2d at 1255. Here, the public interest clearly is

advanced by upholding the plaintiffs' copyrights and granting this injunction based upon the evidence in this record.

28. The Court therefore finds that the evidence establishes by a preponderance of the evidence: (a) that plaintiffs will likely succeed on the merits, (b) irreparable harm, (c) the public interest favors the grant of injunctive relief, and (d) the balance of hardship weighs in favor of granting such relief. Indeed, the evidence preponderates that this website was established, used, promoted, advertised and sold to attract users in the United States to circumvent the trade and copyright laws of the United States and to circumvent the trade and copyright rights of the plaintiffs. See *Hearing Exs. 6, 8, 18, 20, 35, 36, 65; Declaration of David Egan; Declaration of Edward M. Katz, Para.4; Simons Dep., Hearing Ex. 90, pp. 36, 44, 64; Cox Dep., Hearing Ex. 91, pp. 35-38, 40-41, 65-66, 69, 73-79, 85-89*. On this record, there can be only one conclusion.

W.D.Pa.,2000.

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